IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

CARL FIORITO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

Petition for Writ of Certiorari

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OPINION OF THE COURT BELOW.

The Opinion of the Supreme Court of Illinois is reported at 19 Ill. 2d 246, 166 N.E. 2d 606. (See Appendix. I, page 21, *infra.*)

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on March 31, 1960; a timely petition for rehearing was denied May 16, 1960.

The statutory provision believed to confer upon this court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED.

1. Is the use by a state court of evidence obtained by federal agents in contravention of the Fourth Amendment to the Constitution of the United States a violation of the Fourteenth Amendment to the Constitution of the United States.

2. May a federal court, because of the fact that the evidence was obtained by federal agents, make its own independent determination of the legality of the search and seizure involved.

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

The petitioner, Carl Fiorito, was indicted by the Grand Jury of Cook County, Illinois, for receiving stolen goods and for robbery. Both indictments were consolidated and were tried without a jury. The defendant was found not guilty of the charge of robbery, but was found guilty of receiving stolen property and was sentenced to the Illinois State Penitentiary for a term of four to six years.

A petition was presented to the court prior to trial requesting that the court suppress certain evidence taken from the person of the petitioner. (Abst. 5, 6) Carl Fiorito, the petitioner, testified that at about 5:00 P.M. on August 21, 1958, he was at the Parkway Hotel, located at 2100 Lincoln Park West in the City of Chicago; that as he entered the foyer of the hotel two men who identified themselves as police officers approached him; that he did not then nor did he later learn the names of these two officers. After he talked with these two men, two other men came up to him and said that they were officers and that they wanted to take him downtown; these two men did not show him any identification or tell him where they were from. The last two officers, subsequently identified as agents William Meincke and Joseph Shea of the FBI, told him that someone downtown got robbed for a half million dollars and their boss wanted to see him downtown. These men put the petitioner in their car and the first two officers followed in their car. (Abst. 6-7).

At the time the petitioner was apprehended he was carrying a brown suitcase which was taken from him by the two FBI agents. He saw the suitcase once more at the FBI office but the FBI agents never returned the suitcase to him. (Abst. 7)

The petitioner testified that he entered the back seat of the FBI car with Agent Meincke and that Agent Shea got in the front seat. Agent Meincke who had possession of the brown bag at that time opened it before they got to the FBI headquarters. Fiorito testified that there was nothing in the bag which he knew of; he admitted that there could have been some things in the bag which he didn't know of. (Abst. 10-11)

When the petitioner and the two FBI agents reached the FBI office the petitioner was taken into an interview room, questioned for two or three hours, and then told to remove his clothing by a third FBI agent. The FBI officers looked through all the linings and cuffs of his clothes and then took a diamond ring which was in one of the petitioner's stockings. (Abst. 7) He said that he had told the FBI agents that he had received the ring from someone at the race track a couple of weeks before that date and that it was his ring. (Abst. 11)

The petitioner testified that he did not give the FBI agents consent to search him, nor did the agents serve upon him or read to him any search warrant. When he was picked up at the hotel, he was not shown any warrant for his arrest. At the time he was picked up he was not committing any breach of the peace nor was he violating any law. (Abst. 7).

The State, in order to maintain the issues on its part, introduced by agreement with the petitioner the affidavit of Mr. Raymond Sunshine into the record. The affidavit stated that Mr. Sunshine was the representative of the Winston Co. in Chicago; that at about 10:30 A.M. on the morning of the 21st of August, 1958, an unknown person entered the premises occupied by himself and the Winston Co.; assaulted the affiant, and took and carried away certain described property of the Winston Co.; that the property had a value in excess of $150,000.00. (Abst. 12-13)

In a stipulation entered into between the state and the petitioner, it was agreed that Mr. Sunshine would testify, were he in court, that the petitioner, Carl Fiorito, was not the person who entered the premises of the Winston Co., assaulted Mr. Sunshine, and carried away the property therein; that he had been shown a photograph of Carl Fiorito prior to 5:00 P.M. on the 21st of August, 1958, and that he told the police officers who showed him the photograph at that time that Carl Fiorito was not the man who entered his premises, assaulted and robbed him that morning. (Abst. 13-14)

Agent William Meincke testified that he was one of the FBI agents who apprehended the petitioner at the Parkway Hotel on August 21. Meincke had known the petitioner prior to that date and had known his reputation for being involved in jewel thefts; he had seen him in the FBI offices in Chicago but had never spoken to him prior to the 21st of August. Meincke was advised of the robbery prior to going out to the hotel; he was advised that an individual had been seen at the scene of the robbery carrying a brown bag. The petitioner was carrying a brown bag when he was apprehended. Meincke denied that there were any police officers at the hotel when he and Shea apprehended Fiorito. He testified that the petitioner agreed to talk with him; that Fiorito denied any knowledge of the robbery; that at this point Agent Shea joined them and that they were sitting on a railing in front of the hotel at that time. (Abst. 15)

Meincke testified that Fiorito said to him, "I suppose you want to know what was in the suitcase," and that he replied, "Not particularly;" Fiorito was fumbling with the catches at that time and said that Meincke might as well help him with them. Then Shea and Fiorito and he decided it would be better to sit in the car and they went

to their car. Meincke testified that Fiorito told him that he knew nothing of the robbery. (Abst. 16)

He also testified that after they got in the car, Fiorito continued fumbling with the suitcase and said, "You might as well help me to get this thing open." The bag was pushed toward Shea, who reached over, tapped the lock, and the cover of the suitcase flew open. The agent testified that he saw therein an empty outer portion of a spool of adhesive tape. (Abst. 16) At that point Meincke asked the petitioner if he minded going downtown with them and he replied no. Meincke testified that the petitioner said, "As a matter of fact, if you would have called me up on the telephone I would have come down anyway." (Abst. 17)

The agent testified that he did not have a warrant for the arrest of Fiorito in his possession at that time, nor did he have a search warrant. (Abst. 18) He admitted that he did not tell the petitioner that they were going to take him downtown when they placed him in their car, but he stated that Fiorito got into the car voluntarily. They remained in the car for about five minutes before they left. The agent denied that Fiorito was in their custody at that time and said that if he had walked away they would not have stopped him. (Abst. 19) He also denied that he searched Fiorito or had him empty his pockets. (Abst. 43-44) In view of the bag that the petitioner was carrying, the agents wanted Fiorito to come downtown so that they could question him further. (Abst. 20)

Meincke further testified that when they got to the offices of the FBI, Fiorito got out of the car himself and walked into the building; that they put him in one of the rooms on the first floor; that he and Shea talked to Fiorito for about ten minutes; that he left and Agent Shea was joined by Agent Noonan; that he did not consider the petitioner under arrest during all of this time. (Abst. 20-21)

The agents finally began to search the petitioner at about 7:00 P.M. Agents Meincke, Shea and Noonan were present at this time. When Agent Noonan told the petitioner to remove his clothes Meincke considered him under arrest. (Abst. 22). Meincke was present when a ring was found in the sock of the petitioner. At the time he went to the Parkway Hotel to see the petitioner, his investigation had disclosed no violation of any federal criminal statute. (Abst. 22)

Agent John Noonan of the FBI testified that he had a conversation with Agent Moore concerning the petitioner; that he had told Moore that there had been a robbery of Mr. Sunshine and that a man about five foot six inches in height, with dark hair, weighing about 160 pounds had been seen in the vicinity on two occasions, two weeks prior to the robbery (Abst. 26); that the victim of the robbery had been taped and handcuffed and that the crime laboratory had possession of the tape used. (Abst. 25) Noonan also told Moore that the crime was accomplished by an unknown individual, who was seen carrying a box or a wrapped frame or suitcase. (Abst. 26, 27) The witness also testified that he had been told that a man six feet tall had been seen in the lobby of the Pittsfield building carrying this box at about 10:30 o'clock that morning. (Abst. 27)

The witness testified that he did not convey this information to Agents Meincke and Shea prior to their departure to find Fiorito. (Abst. 24)

Noonan stated that he was the agent who ordered the petitioner to remove his clothing during the search. He denied that at the time he told him to remove his clothes he informed him he was under arrest. He said that the first time that he informed him he was under arrest was about

7:00 P.M., that he told him the police were coming to place him under arrest and that they wanted to search him for weapons before the police came. The witness admitted that the petitioner did not say that it was all right to search him; the witness denied placing the petitioner under arrest and said that as far as he knew nobody in the FBI had placed him under arrest. (Abst. 28-29)

Agent Marlin H. Moore of the FBI testified that on August 21, 1958, Shea and Meincke called him on the phone and that he told them to go out and locate Fiorito. The agent testified that he had a conversation with Agent Noonan and that somebody at the scene of the robbery had given a description of a person similar to the petitioner. (Abst. 30) The witness also testified that Mr. Sunshine did not identify the pictures of the petitioner and that he had said that the petitioner was not the man he saw commit the robbery. (Abst. 31)

Captain Joseph Morris of the Chicago Police Department testified that at about 6:30 or 6:45 o'clock that evening, he received a call from Agent Moore of the FBI, who informed him that they had Fiorito at their office, that they had no federal violation on him and that he was going to be let go. (Abst. 33) The witness went to FBI headquarters and took custody of Fiorito. (Abst. 34)

Sergeant Joseph Tye of the Chicago Police Department testified that he had talked with the other men in his detail concerning the petitioner prior to the robbery. He said that he had an opinion based upon his conversations with the other officers that Fiorito was "dealing with jewelry." (Abst. 37) On cross examination the witness admitted that he had never arrested the petitioner in his life; that none of the men under his command had arrested him in connection with any jewelry offense; that he had never had occasion to question the petitioner. (Abst. 38)

Tye testified that when he was informed of the robbery at about 10:45 on the morning of the 21st of August, 1958, he went to the scene immediately; that he saw several FBI men there when he got there; that he had a conversation with agents Ziel and Noonan there; that he was cooperating with all agencies including the FBI in the investigation of the robbery. He talked to Agent Moore in connection with the robbery after he returned to his office at about 2:00 o'clock that afternoon. (Abst. 38-40)

Sergeant Tye admitted that in a report he had said that he notified the FBI "who sent agents to the scene immediately" (Abst. 48); that Morris was not informed of the presence of the petitioner in the offices of the FBI until 9:30 P.M. that night (Abst. 49); that he said that "We will continue to investigate this case in conjunction with the Federal Bureau of Investigation;" and that he requested the Crime Laboratory to turn over the evidence found by the police department to the FBI. (Abst. 50)

On redirect examination, the witness testified that he knew that the petitioner had a record but that he did not know whether he had ever been arrested in connection with any jewelry matters. He testified that he knew that some members of the Chicago Police Department had questioned the petitioner with regard to some jewelry thefts. (Abst. 42)

On recross examination the witness admitted that he knew of only one occasion when the petitioner had been questioned in respect to a jewelry theft but could not recall it. The questioning he spoke of had been conducted by his predecessors on the jewelry detail. (Abst. 42-43)

Agent Joseph Ziel testified that when shown the photograph of the petitioner, Mr. Sunshine was unable to identify it. (Abst. 47)

Agent Joseph Shea testified for the petitioner that on the 21st day of August, 1958, he was the partner of Agent William Meincke. His testimony was substantially the same as that of Meincke. (Abst. 52-54)

All of the FBI agents testified that they were familiar with the petitioner and that they had seen him at the FBI offices before.

The Petition to Suppress the Evidence was denied. (Abst. 55)

On August 23, 1958, two days after the apprehension of the petitioner, the FBI agents, Mr. Sunshine and other individuals appeared before a Justice of the Peace in Berwyn, Illinois, executed affidavits, and caused a complaint for a search warrant to be executed. (Abst. 58) The Justice of the Peace thereby caused to be issued a search warrant directing Emil J. Boucek, a constable of Cook County, to search a safety deposit box allegedly rented by the defendant from the Commercial National Bank of Berwyn. (Abst. 66-67) Pursuant to such warrant, the safety deposit box was opened and the objects found therein were returned to the Justice of the Peace. People's Exhibits 1, 2, 3, 7, and 10, and the box itself, People's Exhibit 8, were all subsequently introduced into evidence against the petitioner. (Abst. 86, 124)

On the trial in main, Raymond Sunshine testified that at about 10:30 A.M. on August 21, 1958, he heard the bell which he had on his entrance door ring and he went into the reception hall where he was met by a man wearing a mailman's uniform, who hit him over the head with a blue steel automatic, rendering him unconscious. When he recovered he was being handcuffed, his feet and head were being taped and a ball was put into his mouth.

The assailant then pulled the witness' personal ring off of his finger and removed sixty-five dollars from his wallet. (Abst. 71-72)

On cross examination, the witness described his assailant as a man about six feet tall, who, to the best of his recollection, weighed 160 pounds. (Abst. 79)

Agent Meincke testified substantially the same as he testified on the motion to suppress the evidence. (Abst. 86) He further said that the petitioner had said that he had that brown bag with him the entire day; and that the suitcase belonged to his wife and that he had used it to pick up some shirts from the cleaner. (Abst. 91)

On cross examination, Meincke testified that when Shea snapped the locks on the suitcase, while they were in the car, it was in the petitioner's hands; and that when the suitcase was finally opened it remained in the petitioner's hands. When the locks were snapped the cover did not fly open, but the agent did not know who lifted up the cover. It was either Meincke or Shea. When the cover was finally picked up the suitcase was still on Fiorito's lap. (Abst. 93) Meincke then took out the outer spool of adhesive tape. The petitioner denied to the Agents that he had ever seen the outer spool of adhesive tape. (Abst. 94)

Meincke disclaimed knowledge of whether he took possession of the bag at that time or not. He did not recall whether Shea took the bag and put it in the front seat or not; he did not remember where the bag was at that time. When they arrived at the FBI headquarters Meincke carried the bag into the building. The bag remained in the interview room while the petitioner was kept in there. The spool was taken out of the bag when they were in the room

the witness did not recall who took the spool out of the bag; he was sure that it was not the petitioner; he took the spool out of the room when he left the petitioner in there; the spool was sent to the FBI Laboratory in Washington where it was examined for fingerprints. (Abst. 94-95) To the agent's knowledge there were no fingerprints found on the spool. The agent admitted that when he removed the spool from the interview room he took it without the petitioner's permission. (Abst. 95) The agent testified that he removed the suitcase from the interview room just prior to the time when the petitioner was searched. (Abst. 96)

Meineke testified that he was one of the agents who drove Sunshine to Berwyn on the morning of the 23rd.

Agent Joseph Ziel testified that he had occasion to see the petitioner at the FBI headquarters in Chicago on May 8, 1958, when he fingerprinted him. (Abst. 113)

People's Exhibit 9, the ring discovered during the search of the petitioner, People's Exhibit 11, the outer cover of the spool of adhesive tape, and People's Exhibit 12, the brown suitcase in which it was discovered, were received in evidence. (Abst. 100)

The question of the denial to the petitioner of due process contrary to the Fourteenth Amendment to the Constitution of the United States was raised by motion for new trial in the trial court, (Abst. 132) assignment of error, (Abst. 136) and in the brief of petitioner in the Supreme Court of Illinois.

REASONS FOR GRANTING WRIT.

The issues presented by this petition have never been fully decided by this Court. The problems raised lay somewhere on the fringes of *Wolf* v. *Colorado*, 338 U.S. 25; *Rea* v. *United States*, 350 U.S. 214; *Rios* v. *United States*, ... U.S. ....., 80 S. Ct. 1431; and *Elkins* v. *United States*, ... U.S. ....., 80 S. Ct. 1437. In view of the recent decisions handed down in the *Rios* and *Elkins* cases, an authoritative decision regarding the use in state courts of evidence unlawfully obtained by federal agents is urgently needed. Whereas *Rea* v. *United States*, *supra*, dealt with this problem prior to trial in the state courts, the case at bar presents a situation where the authority of this Court is invoked subsequent to trial in the state court. As a consequence, two related questions are posed for review by this Court: Is the use by a state court of evidence obtained by federal agents in contravention of the Fourth Amendment to the Constitution a violation of the Fourteenth Amendment? may this Court, because of the fact that the evidence was obtained by federal agents, make its own independent determination of the legality of the search and seizure.

Carl Fiorito was arrested, indicted and tried for the robbery of a Chicago diamond merchant and for receiving the goods alleged to have been stolen in the robbery. He was convicted of the charge of receiving the stolen goods, but was acquitted of the charge of robbery. The investigation, arrest and search of the petitioner was conducted by agents Noonan, Shea and Meincke of the Federal Bureau of Investigation. These and other agents of the FBI were called into the case immediately after the robbery, although, as one agent testified, their investigation showed that no federal crime had been committed. Moreover, even after the petitioner had been apprehended and

turned over to the local police, and after the FBI had concluded that no federal crime had been committed, the two FBI Agents principally involved, Shea and Meincke, arranged to secure a warrant for the search of a safety deposit box rented by the petitioner. (Abst. 98-99)

Prior to trial the petitioner interposed a timely motion to suppress the evidence gathered by the FBI agents: A hearing was had and the trial court denied the motion. The denial of this motion and the denial of a second motion to quash the search warrant and suppress the evidence gained thereunder (which denial is not presented herein as a reason for granting the writ) were assigned in the writ of error presented to the Supreme Court of Illinois. (See, Appendix I page 21, *infra.*) That court affirmed the judgment of the trial court, holding that the arrest and search of the petitioner did not violate the constitutional proscriptions against unreasonable searches and seizures. (See Appendix I page 21, *infra.*) It is the petitioner's contention that because of the involvement of the federal officers this Court has the authority and jurisdiction to make its own independent determination as to the legality of the search and seizure conducted by the FBI agents; that this determination is to be governed by the standards imposed upon federal officers by the Fourth Amendment; that the evidence gained by the FBI agents was obtained in violation of these standards; and that the use by the State of evidence so obtained is a violation of the Fourteenth Amendment.

It is apparent, from both the *Elkins* and *Rea* decisions that wherever a search and seizure involves interaction between the federal and state governments, the federal courts, when called upon to do so, may make their own independent determination of the legality of the search and seizure. Mr. Justice Stewart, speaking for the court in the *Elkins* case concluded:

> "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins* v. *United States*, ... U.S. ....., 80 S. Ct. 1437, 1447.

The *Elkins* case (and its companion case, *Rios* v. *United States, supra*) involved the reverse situation of that presented herein. Yet the consideration implicit in *Rea* v. *United States, supra*, that a federal court's decision that evidence was unlawfully obtained would be given precedence even where the case is pending in the state court (and where the state court was most apt to hold the evidence admissible no matter the manner in which it was obtained, see *Breithaupt* v. *Abram*, 58 N.M. 385, 271 P. 2d 827), lends strongly to the conclusion that wherever a federal agency is involved, be it a court or an employee, an independent determination as to the legality of the search and seizure must be made by a federal court. It is further evident that if such determination be made by this Court the standards employed must be those imposed by the Fourth Amendment. *Elkins* v. *United States, supra*; *Rios* v. *United States, supra*.

The Supreme Court of Illinois held, (See Appendix I page 21, *infra*), that the search and seizure conducted by the FBI agents Meincke, Shea and Noonan was not unreasonable and therefore not in violation of petitioner's constitutional rights. The court found that the petitioner had consented to accompanying FBI agents Meincke and Shea from the lobby of the Parkway hotel some miles north of the Chicago Loop to the FBI office

in the Chicago Loop. The court also found that the petitioner had consented to the two agents looking inside of a suitcase which he was carrying at the time, and that he consented to remaining in the FBI offices from approximately 5:00 P.M. until 7:00 P.M. The basis of the decision of the Illinois Court was the rule there prevailing that "where the evidence on the issue of consent is in conflict, [the] court will accept the finding of the trial court unless it is clearly unreasonable." (*People* v. *Peterson*, 17 Ill. 2d 513, 162 N.E. 2d 380; *People* v. *Mathews*, 406 Ill. 35, 92 N.E. 2d 147.) The court then found that at 7:00 P.M. the FBI agents were possessed of sufficient information to lawfully arrest the petitioner, although the record shows that Noonan, the agent apparently in charge of the investigation, denied that the petitioner had ever been arrested by the FBI. (Abst. 28, 29) It was at 7:00 P.M. that the FBI agents ordered the petitioner to strip completely. They discovered in one of his socks a ring which was allegedly taken in the robbery earlier that day.

While the standards imposed by the Illinois court may avail in cases concerning solely the actions of state agents, such standards certainly can have no effect in the determination of the petitioner's rights against federal agents. *Cf. Rea* v. *United States*, *supra*. It was and is the petitioner's contention that the actions of the FBI agents in apprehending him in the Parkway Hotel, driving him in their automobile to the FBI headquarters in the Loop, searching and seizing the suitcase, with its contents, which was in the petitioner's control at the time, maintaining custody over him for two hours in an interview room, ordering him to strip and searching his clothing and seizing therefrom a ring, were done without his consent and in violation of the Fourth Amendment. The cases which have undertaken to define what must be demonstrated

in the way of proving "consent" (sometimes expressed as a waiver of the accused's constitutional rights) clearly indicate that insofar as the Fourth Amendment is concerned, acquiescence in regard to the supremacy of the law is not to be taken for, nor construed as, a waiver of the accused's rights under the Fourth Amendment. *Catalanotte v. United States*, 208 F. 2d 264 (6th Cir. 1953); *Judd v. United States*, 190 F. 2d 649 (D.C. 1951); *Higgins v. United States*, 209 F. 2d 819 (D.C. 1954). Here the petitioner demonstrated acquiescence in regard to the wishes of the two FBI agents; viewed from the perspective of what was done rather than said, there can be no doubt but that he was subjected to the compulsion of the FBI agents from the time they first apprehended him. This is aptly demonstrated by the fact that, despite the contention of agent Meincke that the petitioner was invited into their car, he was seated therein in the manner of a prisoner. (Abst. 16, 19) Furthermore, after the petitioner had been delivered to FBI headquarters, but before he was arrested as that term was understood by the FBI agents, one of the agents was ordered to stand guard over him while the apprehending agents left the room in which he was being questioned. (Abst. 24) Finally, Agent Meincke removed the contents from the suitcase which the petitioner had been carrying and sent them to Washington for examination without the consent of the petitioner and while the petitioner was ostensibly still the "guest" of the FBI. (Abst. 94-95). The facts succinctly demonstrate that the petitioner did not waive his rights under the Fourth Amendment to the Constitution, but that he merely acquiesced in the demands of the FBI agents. The record and the decision of the Illinois Supreme Court make clear the fact that the agents had no other grounds upon which to base their search and detention of the petitioner other than his purported consent.

The actions of the FBI agents being violative of the petitioner's rights under the Fourth Amendment, we submit that a determination must be made by this Court as to whether or not the use in a state court of evidence thus gained is violative of the Fourteenth Amendment. *Wolf* v. *Colorado,* 338 U.S. 25, recognized that "[T]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause." 338 U.S. 25, 27, 28. Unlike *Wolf* v. *Colorado,* however, the case at bar involved interaction between state and federal officers. Whereas this Court has refused to enforce the exclusion of evidence in state courts where the evidence has been obtained, even though in violation of the Fourth and thus the Fourteenth Amendments, by state officers, a different rule appears to apply where federal officers are involved in the constitutionally unlawful search and seizure. In *Rea* v. *United States, supra,* this Court provided a constitutionally aggrieved petitioner remedy by way of the Court's inherent authority over federal agents to provide for the administration of justice. In much the same manner the petitioner in the instant case seeks to be afforded the same remedy subsequent to trial in the state court. A determination by this Court of whether the use by the state court of evidence unlawfully seized by federal agents is a violation of the Fourteenth Amendment is necessary in light of the most recent decisions in this area by this Court.

CONCLUSION.

For the above and foregoing reasons it is prayed that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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APPENDIX I.

Opinion of the Supreme Court of Illinois.

The People of the State of Illinois, Defendant in Error v. Carl Fiorito, Plaintiff in Error.

MR. JUSTICE DAVIS delivered the opinion of the court:

Separate indictments, filed in the criminal court of Cook County, charged the defendant, Carl Fiorito, with the crimes of robbery and receiving stolen property. He waived jury trial and by stipulation the cases were consolidated for trial before the court. He was found not guilty of robbery, but was found guilty of receiving stolen property and was sentenced to the penitentiary for a term of not less than four nor more than six years.

Defendant urges that the trial court erred in its denial of a petition to suppress certain evidence and its refusal to quash a search warrant. He contends that his constitutional rights were violated when property was taken from his person at the time of his arrest and that the search warrant was issued without probable cause. Hearings were held before the court upon both of these questions prior to the trial of the case on the merits. Defendant testified at the hearing on the petition to suppress evidence but not thereafter. The only evidence at the trial was adduced by the People. The facts were undisputed except as to what transpired at the time of defendant's arrest.

On August 21, 1958, Raymond Sunshine was the Chicago representative of Harry Winston, Inc., a diamond broker of New York City, with offices on the fifth floor of the building located at 55 E. Washington Street. At the time in question, six leather wallets containing dia-

monds of a value of more than $150,000, which were individually wrapped in paper, were in a vault on the premises and certain currency was also in a cash box.

Sunshine was alone in the office at about 10:30 A.M. when a bell sounded indicating that someone had entered the reception room. He went to the outer office and saw a man clad in a blue uniform and cap who held a large package which almost completely covered his face. The man announced that he was a "mail man" and Sunshine opened a door to the inner office to admit him. Thereupon the man struck Sunshine over the head with a gun and proceeded to truss and bind him. He placed a small ball in Sunshine's mouth and used one inch adhesive tape to cover his face and head. The man then forcibly removed Sunshine's diamond ring in such manner that his finger bled. While these events were transpiring, Sunshine could hear noises and muffled conversation in the inner room where the vault was located. After the robbers had gone, Sunshine was released by his wife who had been in a nearby beauty shop. It was then discovered that all of the diamonds and wallets as well as the cash had been taken. The police were notified.

Joseph Tye, a sergeant in charge of the jewelry detail, arrived at the scene of the robbery when other officers, as well as agents Noonan and Ziel of the Federal Bureau of Investigation, herein referred to as the F.B.I., were already present. From investigation, Tye learned that the victim had been bound with one-inch adhesive tape and that a man about 5 feet 6 inches tall of medium stocky build carrying a brown suitcase had been seen in the vicinity prior to and about the time of the crime. Tye reported these facts to his superiors including Joseph Morris, who was then acting deputy chief of detectives of the Chicago police department.

The testimony of Tye and Morris indicated that defendant was known to them; that he had been under their surveillance as one suspected of jewel thefts; and that the defendant fit the description of the man carrying the brown suitcase.

At about 3:00 o'clock P.M. on the date of the robbery, a man giving the name of Carl Perri appeared at the Commercial National Bank of Berwyn and inquired about renting a safety deposit box for a short period of time. He gave a Gary, Indiana, address and telephone number, both of which were fictitious. The vault clerk, who handled the transaction, testified that she saw the man place two black leather wallets in the box which was then rented to him. These wallets, as well as the diamonds they contained, were later identified at the trial by Sunshine as the property of Harry Winston, Inc., which was taken in the robbery. The defendant was positively identified by employees of the bank as the man who gave the name of Carl Perri, rented the box, and deposited the wallets.

From the testimony of William Meincke and Joseph Shea, agents of the F.B.I., it appeared that they were assigned by their superior, Martin Moore, to question defendant concerning the robbery. At about 5:00 P.M., they were at the Parkway Hotel located at 2100 Lincoln Park West in the city of Chicago when defendant entered carrying a brown suitcase. Meincke stated that Shea was using the telephone when the defendant appeared and that he approached defendant, showed his credentials and advised him that there had been a diamond robbery about which he desired to question him. Defendant said: "Fine." They then left the building and sat on an iron railing outside where Shea soon joined them.

There they had a conversation in which defendant denied any knowledge of the robbery and stated that he supposed

they wanted to see what was in the suitcase. Meincke replied: "Not particularly," while defendant fumbled with the snaps on the suitcase, but was unable to open it. It was then decided that they could talk better in the agents' car which was parked nearby. When they entered the car, Meincke and defendant sat in the back seat and Shea in the front. Defendant again fumbled with the snaps on the suitcase and said, "Help me open it." At that point, according to Meincke, defendant shoved the bag toward Shea who reached out and tapped one of the snaps and the bag opened revealing the outer cover of a spool of one-inch adhesive tape. Meincke testified that he then asked defendant if he would mind going down to their office to talk further about the robbery and that defendant replied that he wouldn't object and said: "As a matter of fact, if you would have called me up on the telephone I would have come down anyway."

Meincke further testified that, when they arrived at F.B.I. headquarters, the defendant voluntarily accompanied them to an interview room on the first floor of the building. There they conversed about the robbery, but defendant denied any implication. John C. Noonan, the agent who had helped investigate the robbery on the premises earlier in the day, was also present. He had learned that a man answering defendant's description had been seen carrying a brown suitcase in the vicinity of the robbery and communicated this fact to his superior, Marlin Moore, who, in turn, had ordered Meincke and Shea to question Fiorito.

Shortly before 7:00 P.M., when Noonan was in the interview room, the defendant asked if he was to be placed under arrest. Noonan told him that he would inquire and let him know. Noonan testified that he left the room and returned shortly and told defendant he had "bad news" for him—that the Chicago police wanted him. Noonan

then searched defendant and found a diamond ring in one of his socks, which was identified by Sunshine as the ring taken from his finger during the robbery. At the trial, a dried brown substance on the inside of the ring was proved to be human blood.

Before this search was made Marlin Moore had a telephone conversation with Joseph Morris of the Chicago police department in which Moore told Morris that defendant was in their interview room; and that he was about to be released since there was no Federal charge against him. In the course of the conversation Moore mentioned that the outer cover of a spool of adhesive tape had been found in a brown bag carried by defendant. Based upon information furnished by Tye earlier in the day relative to the brown bag and tape, Morris then told Moore to hold the defendant and stated: "We want him." The evidence further showed that Morris and Tye immediately went to the F.B.I. headquarters where defendant was placed in their custody.

On August 23, 1958, a warrant to search the safety deposit box at the Berwyn bank was issued by a justice of the peace of Cook County on a complaint signed by Sunshine, Meiacke and two employees of the bank. Supporting affidavits were filed by three bank employees, Sunshine and Meiacke. The warrant was executed by a constable who caused the lock on the box to be drilled. The contents were inventoried and a proper return was made. As already indicated, the wallets and diamonds produced from the box were identified at the trial as the property of Harry Winston, Inc., and received in evidence. The court also admitted the brown bag, spool cover and diamond ring taken from defendant's person.

Defendant's version of the events at the Parkway Hotel differed materially from that of the officers. According to

defendant, he was met there by four men, two of whom identified themselves as police officers and two whom he later learned were F.B.I. agents. One of the latter told him that there had been a robbery involving over half a million dollars and that they wanted to take him downtown to see their boss. Thereafter the agents put him in their car and took him to their offices and the policemen followed in another automobile.

Defendant stated that he was there questioned for the first two or three hours after arrival; and that he was then ordered to take off all of his clothes at which time the diamond ring was found in his sock.

He claimed that the ring belonged to him and that he had gotten it from someone at the race track a couple of weeks previously. He further testified that when the officers met him at the hotel, they neither served a warrant of arrest upon him nor showed him a search warrant. He denied that he had ever consented to a search of his person or effects; stated that the brown suitcase belonged to his wife; and denied any knowledge of its contents. He stated that when he entered the hotel he was about to pick up some laundry and had the bag with him for that purpose; that agent Meincke took this bag and opened it after they had entered the automobile; and that it was never returned to him.

On cross-examination defendant admitted that he had on previous occasions gone to the F.B.I. headquarters on request, but denied knowing either Meincke or Shea before the meeting at the Parkway Hotel. However, both Meincke and Noonan testified that they knew defendant, had seen him in their offices at previous times, and knew that he had been under surveillance for jewel thefts.

Neither the constitution of the United States nor that of this State forbids all searches and seizures. The prohibition is only against unreasonable searches and does not extend to immunity from search upon a lawful arrest. (*Harris* v. *United States*, 331 U.S. 145, 150, 91 L. ed. 1399; *People* v. *La Bostrie*, 14 Ill. 2d 617, 621; *People* v. *Clark*, 9 Ill. 2d 400, 404.) An arrest without a warrant is lawful if a criminal offense has in fact been committed and the arresting officer has reasonable grounds for believing that the person to be arrested has committed it. (Ill. Rev. Stat. 1957, chap. 38, par. 657; *People* v. *La Bostrie*, 14 Ill. 2d 617, 621; *People* v. *Boozer*, 12 Ill. 2d 184, 187; *Draper* v. *United States*, 358 U.S. 307, 3 L. ed. 327.) Probable cause or reasonable grounds in such a situation means something less than the evidence which would result in conviction. *People* v. *Jones*, 16 Ill. 2d 569, 573.

There is a great difference between that which is required to prove guilt in a criminal case and probable cause for arrest and search, as well as in the tribunals which determine such matters, and therefore, a like difference in the *quanta* and *modes* of proof required to establish such guilt or probable cause. (*Draper* v. *United States*, 358 U.S. 307, 3 L. ed. 2d 327; *Brinegar* v. *United States*, 338 U.S. 160, 93 L. ed. 1879.) Probable cause for arrest exists where the facts and circumstances within the arresting officer's knowledge and of which he had reasonable and trustworthy information are sufficient in themselves to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested is guilty. *People* v. *Jones*, 16 Ill. 2d 569, 574; *People* v. *La Bostrie*, 14 Ill. 2d 617, 622.

It is defendant's contention that he was arrested at the Parkway Hotel at a time when the officers had no reasonable grounds to believe that he had committed any offense;

and that his arrest and the subsequent search of his person and seizure of his property were therefore illegal. The People, however, urge that defendant was not arrested until about 7:00 P.M.; that the arrest actually occurred in the F.B.I. offices after the officers were possessed of such information as to afford reasonable grounds for believing that defendant was implicated in the robbery and that the arrest and search incidental thereto were both lawfully made at that time. They further contend that the suitcase was opened with defendant's express consent and at his suggestion.

The evidence clearly indicates that defendant was not arrested at the hotel. While defendant's version relative to what occurred there differs from that given by the officers, there are certain undisputed facts and circumstances which justify the belief that the officers told the truth when they stated that they went to the hotel only to question the defendant; that they had no orders to arrest him and did not then arrest him; and that he voluntarily accompanied them to the F.B.I. offices to talk to them about the robbery. It is admitted that defendant had voluntarily appeared there for questioning on prior occasions when no arrest occurred. This circumstance lends credence to Meincke's testimony that defendant voluntarily agreed to come with them and stated: "As a matter of fact, if you would have called me up on the telephone, I would have come down anyway." The testimony of agent Noonan also supports the statements of Meincke and Shea as to what transpired at the hotel. Noonan testified that he and defendant were in the F.B.I. offices at about 7:00 P.M. when defendant asked if he was to be placed under arrest. Defendant did not deny that he asked this question. The inquiry indicated that defendant did not consider that he was then under arrest and that nothing had happened previously to induce such a belief.

There is also the undisputed testimony of Joseph Morris relative to his telephone conversation with Marlin Moore of the F.B.I. in which the latter stated that defendant was in the F.B.I. offices and was about to leave because they had no charge against him. The only reasonable conclusion from this evidence is that defendant's arrest did not occur until after Morris requested Moore to hold him for the police department. It was apparently immediately thereafter that Noonan informed defendant that he had "bad news" for him in that the police department wanted him, and conducted the search of defendant's person which produced the ring.

There remains the question of whether, at the time of the arrest, the police officers and the F.B.I. were possessed of information which would induce belief in the mind of a reasonably cautious person that defendant was implicated in the robbery. There is no doubt that, prior to the arrest, both the police and agents of the F.B.I., knew that a robbery had been committed and that diamonds of great value had been stolen. While the police and Federal agents had conducted separate investigations, there were certain facts of common knowledge to both, especially after the telephone conversation between Morris and Moore. They then knew that a man resembling defendant had been seen outside the Winston offices some two weeks prior to the robbery and had been observed in the building on the day of the crime, carrying a brown suitcase.

The officers also knew that the victim of the robbery had been bound by Johnson & Johnson adhesive tape, one inch in width; that defendant was carrying a brown suitcase when first seen six hours after the robbery and that the outer cover of a spool of tape of the size and make found at the scene, for which defendant was unable to account, was discovered in the suitcase carried by him. In

addition, defendant, who was known to both the police and Federal agents, had previously been under surveillance in connection with his suspected implication in jewel thefts and had voluntarily appeared for questioning.

A completely satisfactory determination of what constitutes reasonable cause for arrest by an officer without a warrant is difficult to formulate. The recurring question must be resolved by the facts and circumstances of each case. In deciding the question in a particular case the courts deal with probabilities and are not disposed to be unduly technical. They must act upon "the factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act." (*United States* v. *Rabinowitz*, 339 U.S. 56, 63, 94 L. ed. 653, 659; *Brinegar* v. *United States*, 338 U.S. 160, 175, 93 L. ed. 2d 1879, 1890; *People* v. *La Bostrie*, 14 Ill. 2d 617, 621, 622; *People* v. *Tillman*, 1 Ill. 2d 525, 530.) In view of the facts known to the officers at the time, the arrest in the case at bar was lawful. It follows that the search of defendant's person and seizure of the ring were likewise legally justified. Since this evidence was obtained without violating the defendant's constitutional rights, he was not entitled to have it suppressed.

The testimony of the officers, if believed, established that the spool cover found in the suitcase was discovered with the consent of the accused. It was therefore admissible against him though obtained without a search warrant and though no warrant for his arrest had been issued at the time. (*People* v. *Matheus*, 406 Ill. 35; *People* v. *Preston*, 341 Ill. 407; *People* v. *Akers*, 327 Ill. 137.) In such cases where the evidence on the issue of consent is in conflict, this court will accept the finding of the trial court unless it is clearly unreasonable. (*People* v. *Peterson*, 17 Ill. 2d 513; *People* v. *Matheus*, 406 Ill. 35; *People* v. *McDonald*,

365 Ill. 233.) The trial judge apparently believed the testimony of the officers on this question and we are not prepared to say that his conclusion is unreasonable.

The defendant argues that the search warrant was issued without probable cause because the affidavits filed in support of the complaint for the warrant failed to state facts from which a reasonable basis for the issuance of the warrant may be found. Particularly, defendant urged that none of the affidavits contain any statement from which it would be reasonable to infer that the property in the box to be searched was the property taken in the robbery. We cannot agree.

Five affidavits were filed in support of the complaint. Collectively they state facts which established the commission of the robbery at 10:30 A.M. on August 21, 1958. They contained a detailed description of the diamonds and wallets then taken. They recited that on the afternoon of the same day that defendant Fiorito, giving the name "Carl Perri," rented a safety deposit box at the bank in Berwyn and placed therein black leather wallets of the same size, which was specified, as those taken in the robbery; and that no person other than Fiorito had access to this box.

It is true that none of the affidavits stated unequivocally, or as a conclusion, that the wallets placed in the box by Fiorito were actually those taken in the robbery. This was unnecessary. "If there is reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, it is a sufficient basis for the issuance of a search warrant." *People* v. *Lavendowski*, 329 Ill. 223, 230.

A complaint for such a warrant is sufficient to authorize its issuance when the facts, stated and sworn to, show

probable cause for the writ. It is not required that the complaint show, beyond a reasonable doubt, that the warrant should be issued. (*People* v. *Dolgin*, 415 Ill. 434, 441; *People* v. *DeGeovanni*, 326 Ill. 230, 234.) Here the fact that Fiorito, within five hours after the robbery, rented a deposit box under an assumed name and placed in it property, described as almost identical to that which was stolen, was in itself a circumstance sufficiently strong to induce the belief in the mind of a cautious person that he was implicated in the crime.

He urges that "wallets such as these, or similar thereto, are placed in safety deposit boxes every day." However, we believe that it may reasonably be said that such deposit is rarely accompanied by circumstances showing the use of a false name, fictitious address and telephone number, and at a time and place coincidental with a $150,000 diamond robbery.

The existence of probable cause is a judicial question to be decided in the first instance by the magistrate before whom the complaint for a search warrant is made. (*People* v. *Dolgin*, 415 Ill. 434, 440.) That issue was properly resolved in this case by the magistrate and by the trial court which reviewed his action on the motion to quash the warrant. The affidavits, taken together, make a clear case of probable cause and the trial court's denial of the motion to quash the writ must be sustained.

The evidence of defendant's guilt is clear and convincing. He does not question the legal sufficiency of the proof. Since no reversible error occurred at the trial, the judgment of the criminal court of Cook County must be affirmed.

Judgment affirmed.